D.B. INCOME TAX APPEAL NO.42/2001

CIT, Jodhpur **Vs.** M/s Laxmi Cinema, Barmer

Date : 18.10.2006

PRESENT

HON'BLE MR. JUSTICE RAJESH BALIA
HON'BLE MR. JUSTICE GOPAL KRISHAN VYAS

Mr. Sangeet Lodha for the appellant.
Mr. Sanjeev Johari for the respondent.

We have heard learned counsel for the parties.

At the time of admission of the appeal, the following question was framed as substantial question of law:-

> Whether in the facts and circumstances of the case, a sum of Rs.50,840/- disclosed by the assessee as capital receipt deprived from sale of realisation of old machinery and furnitures' scrapes though held to be revenue receipt is liable to be taxed, could still be not included in the total taxable income by considering it to be part of the addition made on account of

undisclosed income?

The learned counsel for the respondent urged that question appears to have been framed on an erroneous premise inasmuch as the amount has not been deleted from the income of the assessee as added by the Assessing Officer on the ground appearing in the question but was on a definite finding that amount received by the assessee was as a result of sale of machinery and furnitures. The learned counsel invited our attention to finding recorded by the Tribunal in the following terms:-

> "We have considered the rival submissions as also the material on record. In our opinion, the basis given by the CIT (A) for deleting this addition is not correct inasmuch as at the intangible addition has been made on account of investment in building a/c out of undisclosed income whereas the sale proceeds of old furniture and machinery amounting to Rs.50,840/- have been duly recorded by the assessee in its books of account. As far as the nature of this receipt is concerned, we are of the view that the

> same has to be treated as capital receipt since the same has arisen from the sale of capital goods. Accordingly, we direct that this amount of sale proceeds be adjusted against the cost of respective assets."

In fact the reasoning of deleting the amount additions made by the assessing officer the question finds place in the order of the CIT (Appeals) which has not been accepted as correct by Tribunal. There is substance in the objection raised by learned counsel for the respondent to framing of question.

The learned counsel for the Revenue urged that at any event whether the receipt was a capital or revenue receipt is a mixed question of law and fact and is to be decided.

In the present case, on admitted facts, this question really does not arise for consideration as there appears to be mis-apprehension about dealing of receipt of sale of machinery and furniture used for the business purposes.

Under Section 41 in respect of capital assets owned by the assessee for the purpose of business of assessee are sold or discarded the realisation from such sale including that of the scrap included in the total taxable income as a balancing charge provided the receipts of such transaction was in excess of the written down value of such assets. It is only where the receipts arising from the sale of such old machinery or furniture or the scrap acceded such value, the question of inclusion of receipt in income would have arisen.

In the present case, there is no denial of the fact that machinery and furniture were used for business purpose. Therefore, its sale could not result in revenue receipts. In case its realisation are more than capital value it could be for levy of tax under capital gains. Treating the balancing charge of the year in which the realisation of such assets is made was part of provisions of Section 41 until 1.4.1987 and w.e.f. the assessment year 1987-88. Sub-section (2) of Section 2A of the Section 41 were omitted and the provisions have been

re-introduced w.e.f. 1.4.1998. During the relevant assessment year 1988-89 the provision of bringing to tax the balancing charge of the Revenue receipt was not even in force. Be that as it may, there is nothing on record to suggest that realisation from the sale of old machinery and furniture was more than its written down value so as to consider its inclusion in the income.

In view thereof, the question is academic. The question now which is sought to be raised by learned counsel for the appellant as a substitute for the question already framed is academic.

The appeal is, therefore, dismissed.

[GOPAL KRISHAN VYAS], J. [RAJESH BALIA], J.

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